Nos. 90-802, 90-807, and 90-1094

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

WILLIAM M. KUNSTLER, LEWIS PITTS
and BARRY NAKELL
Petitioners,

v.

JOE FREEMAN BRITT, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF THE NORTH CAROLINA ACADEMY OF TRIAL LAWYERS IN SUPPORT OF PETITIONS

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MOTION OF THE NORTH CAROLINA ACADEMY OF TRIAL LAWYERS FOR LEAVE TO FILE AMICUS BRIEF

The North Carolina Academy of Trial Lawyers hereby moves the Court, pursuant to Rule 37.2 of this Court's Rules, for leave to file the annexed Brief Amicus Curiae of the North Carolina Academy of Trial Lawyers in Support of Petitioners. Petitioners consent to the filing of the amicus brief; respondents do not oppose this motion for leave to file, but do not consent to it.

The North Carolina Academy of Trial Lawyers is a voluntary bar association of more than 3000 North Carolina lawyers who represent persons who have suffered civil injury or face criminal prosecution. The Academy has appeared before numerous courts as amicus curiae in both criminal and civil cases.

The interest of the Academy in this matter is that the district court imposed Rule 11 sanctions of $122,834.28 against public interest lawyers representing Native Americans complaining of racial and social injustice in Robeson County, North Carolina. While the Fourth Circuit vacated this award and remanded for further consideration of the nature and extent of sanctions, it affirmed the finding that petitioners had violated Rule 11 and should be punished. The Academy and its members, who have often represented the oppressed in unpopular causes, are concerned that Rule 11 has been invoked to chill civil rights litigation and deprive the underprivileged

of access to the courts. See S. Burbank, Studies of the Justice System: Rule 11 in Transition -- the Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 (1989).

The Academy is particularly troubled by the Fourth Circuit's approval of the procedures employed by the district court, substantially limiting the due process rights of attorneys, notwithstanding the law in other circuits. Since Rule 11 was amended, federal district courts in North Carolina have issued more than twenty published Rule 11 decisions; unpublished decisions abound. For North Carolina attorneys, the prospect of facing a Rule 11 motion is no longer simply a possibility; it has become a probability. As a result, the Academy's members have a personal interest in seeing that the Fourth Circuit's decision in this case is reversed and they are, in the future, afforded the same due process afforded to attorneys in other jurisdictions. In particular, the Academy is seeking to file

this brief in order to raise a due process question not addressed by any other party: Whether attorneys have a right to be heard on the nature and extent of sanctions imposed. The Fourth Circuit held in this case that there was no such general right.

As an organization of attorneys, who must practice in over-crowded courts and who are repeatedly confronted with settlement and dismissal decisions, the Academy is also concerned that the Fourth Circuit's opinion will mean that, unlike the practice followed in the Second and Third Circuits, actions filed and closed in the Fourth Circuit will have no definite or conclusive end -- but will always remain ripe for resurrection and further litigation as to belated and unforeseen sanctions motions.

For these reasons, the Academy requests leave to file its amicus brief.

Respectfully submitted,

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March 25, 1991.

QUESTIONS PRESENTED

In addition to the questions set forth in the petitions, this matter presents the following question:

> May a district court impose monetary sanctions for violation of Rule 11 based on the movant's attorneys' fee statements without affording the sanctioned party any opportunity to respond to them or otherwise address the issue of the nature and extent of sanctions?

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INTEREST OF THE AMICUS

The interest of the North Carolina Academy of Trial Lawyers is set forth in the accompanying motion for leave to file.

STATEMENT OF THE CASE

The Fourth Circuit affirmed in part an order of the Eastern District of North Carolina imposing Rule 11 sanctions on plaintiffs' counsel, the petitioners in this

proceeding. The district court issued sanctions upon defendants' motion, filed six weeks after the court entered an order granting plaintiffs' unopposed motion for dismissal with prejudice.

Petitioners brought this action under 42 U.S.C. § 1983 on behalf of a number of Native Americans who claimed they were being harassed by law enforcement officers of Robeson County, North Carolina. After three months of litigation, the primary issues in the case became moot. Plaintiffs therefore decided to terminate the action.

Petitioner Barry Nakell telephoned his counterpart, defense counsel Joan H. Byers. In response to Mr. Nakell's request that she enter into a stipulation dismissing the case pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, Ms. Byers stated that she would need some time to consider the matter. In a return call, Ms. Byers advised Mr. Nakell that, although defendants had no

objection to a voluntary dismissal, obtaining authorization to enter into a stipulation would be time consuming and inconvenient. She suggested that plaintiffs simply file a motion for dismissal stating that defendants had no objection.

Accordingly, plaintiffs filed a motion for voluntary dismissal with prejudice under Rule 41(a)(2). The motion stated: "[c]ounsel for all defendants have authorized plaintiffs to represent to the Court that they do not oppose this motion and do not object to the Court granting it."

The district court granted the motion on May 2, 1989. The court's order did not reserve jurisdiction for collateral proceedings. Nor did the order in any way contemplate the possibility of Rule 11 sanctions.

Similarly, in negotiating the terms of the lawsuit's termination, Ms. Byers did not mention any potential Rule 11 motion. Indeed, the record fails to indicate any

suggestion of a forthcoming Rule 11 motion from the day the complaint was filed until six weeks after it was dismissed.

Then, on June 13, 1989, out of the blue, defendants filed a broadside motion for Rule 11 sanctions -- resurrecting all of the legal and factual issues of a case long thought lifeless. Petitioners, surprised by this rather bizarre turn of events, asked defense counsel to meet with them to discuss the matter. Their response: Tell it to the Judge.

With no explanation forthcoming from their adversaries, petitioners turned to the court for assistance. They moved for an evidentiary hearing and an opportunity to conduct discovery on the issue. The court simply ignored their requests.

Ultimately, the district court decided the Rule 11 motion entirely from affidavits and oral argument. No

witnesses were sworn, cross-examined, or "eyeballed." By comparing contradictory affidavits and relying on newspaper clippings, the court resolved issues of fact, determined credibility, and eventually arrived at the ultimate factual finding underlying its decision: "[T]he entire complaint is tainted by improper purpose. . . ." (Order at 19)

For example, the district court based its critical finding that "the civil action was instituted as leverage in these extradition proceedings" (Order at 8) on the affidavit of a New York lawyer:

> Neal P. Rose, a New York District Attorney, has filed an affidavit with the court stating that Mr. Pitts offered to dismiss this civil action as part of the plea bargain and that Mr. Pitts admitted that the civil suit had been commenced as leverage and that it had no basis in fact.

(Order at 8)[1] The district court failed to mention in its decision, however, that it had before it the affidavit of a second New York lawyer, Alan Rosenthal, who remembered things quite differently from Mr. Rose:

> I have read Mr. Rose's affidavit and take issue with his subjective determination that Mr. Pitts implied that there was no factual basis for the civil lawsuit referred to above.
>
> I was local counsel for Timothy Jacobs during his extradition proceeding in New York. In that case I served as local counsel to Lewis Pitts, Esq. During the nume ous

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[1]In fact, Mr. Rose's affidavit stated:

> Deponent recalls at least one occasion during the course of these extradition proceedings in New York State when E. Lewis Pitts stated in words to the effect that the civil suit commenced in Federal Court North Carolina [sic] had been commenced as leverage to bring about a favorable plea bargain for Timothy A. Jacob, and the clear implication of Mr. Pitts' remarks was that there was no factual basis for the civil lawsuit which had been commenced.

(Rose aff. ¶ 8; emphasis added)

> conversations I had with Mr. Pitts about the impending civil lawsuit, referred to above, never once was it ever directly stated, or even implied, that there was no factual basis for the civil lawsuit.
>
> At no time did Mr. Pitts say anything to imply that the lawsuit commenced in Federal Court in North Carolina was merely commenced for leverage to bring about a favorable plea bargain for Mr. Jacobs, nor did he imply that there was no factual basis for the civil lawsuit.
>
> I was present during all of the Chambers conferences conducted between District Attorney Rose, Judge O'Brien and Mr. Pitts.
>
> During several of these conferences the District Attorney took such an antagonistic posture towards Mr. Pitts so as to refuse to speak to him. I believe that Mr. Rose's personal antagonism towards Mr. Pitts has affected his ability to accurately represent any implications of Mr. Pitts' remarks.

(Rosenthal aff. ¶¶ 5-9; emphasis added) This attorney's affidavit, which flatly contradicted the Rose affidavit, was

totally ignored by the district court.[2]

A clearer example of a disputed issue of material fact cannot be imagined. Yet, based solely on these typewritten words, the court apparently determined that (1) the Rose affidavit was true in its entirety, (2) the Rosenthal affidavit was so inherently incredible as to be unworthy of mention, and (3) petitioners, therefore, were using the civil suit as leverage.

This example is not isolated. Without having heard a single witness, the district court offered its conclusions ten times during the twenty-four page order, as to the "purpose," "motive," "motivation," or "intent" of plaintiffs' counsel. (Order at 6, 7, 9, 10, 12, 19) Petitioners had defended themselves vigorously and "[t]he

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[2]Indeed, the district court disregarded all of the evidence submitted by petitioners: "Counsel has submitted a stack of affidavits and exhibits . . . . The court has reviewed this material and is not impressed." (Order at 19)

affidavits submitted by counsel strongly disputed the court's conclusions . . . ." In re Kunstler, 914 F.2d 505, 520 (4th Cir. 1990). They offered legitimate explanations for their litigation decisions. The district court chose to condemn these affidavits -- and not the State's, filed to obtain substantial fees -- as "self-serving." (Order at 19) Time after time, it rejected petitioners' facially plausible reasons as "difficult to accept," "not credible," and "absurd." (Order at 8, 10, 11, 12)

In reaching this conclusion of fabrication, the district court pointed to events that were equally susceptible of a sinister interpretation and an innocent rationale. Each time, it drew the inference most favorable to the moving party. According to the court, "[t]he most damning evidence of all" was the voluntary dismissal, which it found more consistent with filing suit for publicity than with petitioners' sworn explanation that the interference had

substantially stopped. (Order at 9, 11) Similarly, it condemned as "astonishing conduct," amounting to intimidation, petitioners' forwarding a copy of the complaint to the trial judge -- although the same judge had admittedly asked them in a letter to "write me explaining what you do." (Order at 9)

The court's decision was thus riddled with multiple findings that petitioners or other lawyers were untruthful, determinations of motive or intent from evidence equally consistent with appropriate conduct, and resolutions of disputed issues of fact from conflicting affidavits.[3] (Order at 6-12) Necessarily, such determinations comprised a substantial basis of the court's conclusion that the complaint

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[3]The complex factual disputes underlying the matter are evidenced by respondents' February 18, 1991 motion that this Court double the page limitation permitted for responsive briefs on the ground that "respondents substantially disagree with the facts and law as presented . . . ."

violated Rule 11.

Apparently having reached its conclusions shortly after the September 8, 1989 oral argument, the court wrote defense counsel and asked them to set forth their time charges. Defense counsel immediately submitted affidavits averring attorneys' fees and expenses totalling $92,834.28. Defense counsel signed and served copies of these affidavits by mail on September 27, 1989.

On the very next day, September 28, 1989, the district court agreed with every penny of defense counsel's fees, held that the fees were reasonable, and imposed them as a sanction against plaintiffs' counsel. Petitioners had no opportunity at all to question the amount of such fees, the fact that one attorney had billed exactly "5.0 hours" on 57 of 93 days, the reasonableness of the fees under the circumstances, or whether the fees could have been mitigated.

In addition to the attorneys' fees sanctions, the district court found that petitioners' conduct was so "egregious" as to warrant imposition of "punitive sanctions" in the amount of $10,000 each. As a final sanction, the court ordered that, until the entire sanction of $122,834.28 plus interest was paid, petitioners would be barred from practicing before it. (Order at 23) Petitioners, who had no warning that such "punitive sanctions" might be forthcoming, similarly had no opportunity to address this additional punishment.

On appeal, the Fourth Circuit affirmed the finding that petitioners had violated Rule 11. In holding that sanctions were appropriate under all three prongs of Rule 11 (improper purpose, ungrounded in fact, unfounded in law), the circuit court ruled that the district court had properly reached its decision without an evidentiary hearing. While such an evidentiary hearing "would have

been of value" according to the Fourth Circuit, "[d]ue process does not require an evidentiary hearing before sanctions are imposed." 914 F.2d at 522, 521.

The Fourth Circuit reversed the district court's decision, however, on the extent of sanctions. The court ruled that the failure to provide petitioners any opportunity at all to contest this issue violated due process: "Under the facts of this case, particularly the amount of the sanction, due process requires that appellants have some opportunity to contest the amount of the sanction imposed." 914 F.2d at 522. The court limited this requirement, however, to this particular case. Id.

The Fourth Circuit set aside the award of sanctions, and remanded the case for reconsideration of the issue in light of certain guidelines. On remand, petitioner would be given an opportunity to contest the type and amount of sanction. 914 F.2d at 522. Such sanctions, which should

be the least severe adequate to accomplish Rule 11's goal of deterring future litigation abuse, could not include the "punitive sanctions" of $10,000 per attorney. 914 F.2d at 525.

REASONS FOR GRANTING THE WRIT

In the past eight years since Rule 11 was amended, there have been more than 1000 reported decisions addressing Rule 11. Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1143 n.3 (9th Cir. 1990) (en banc). Nevertheless, the circuit and district courts continue to struggle with fundamental procedural questions. As one commentator has pointed out, "[t]he rule gives very little direct guidance . . . ." 5A Wright & Miller, Federal Practice and Procedure § 1337 at 120.

This Court has addressed four of the outstanding procedural questions in three recent decisions: whether law firms (as opposed to individual attorneys) may be

sanctioned, the effect of a unilateral voluntary dismissal under Rule 41(a)(1)(i), the standard for appellate review, and the standard to be applied when sanctioning parties. Unresolved, however, are two even more basic issues: (1) the amount of due process to be afforded attorneys prior to imposing sanctions; and (2) the ability of Rule 11 to upset the presumption of finality of judgments.

The lower courts have been unable to reach a consensus on these two questions although the stakes at issue are high. Sanctions are often substantial: In this case, sanctions were $122,834.28 plus interest; another court has imposed sanctions of $443,564.66. Brandt v. Schal Associates, Inc., 131 F.R.D. 512, 518 (N.D. Ill. 1990). Yet, the district courts have received no definitive guidelines as to the amount of due process required prior to imposing punishment of such magnitude. Due process is administered on an ad hoc basis.

The stakes, though tremendous for attorneys, are also high for the courts. They have an interest in assuring that cases once apparently resolved -- whether by settlement or decree -- do not rear their heads again sometime in the indefinite future. Cases must have an end. The Fourth Circuit's decision, however, in direct conflict with the Second and Third Circuit rules, permits Rule 11 motions to be filed without notice a substantial period of time after an unopposed court-ordered dismissal with prejudice. A Pennsylvania federal judge's final order is more final than a North Carolina federal judge's final order.

Given (1) the deluge of Rule 11 motions, (2) the frequency with which these basic procedural questions arise; and (3) the lower courts' inability to reach a definitive resolution of these issues, this Court should grant the petitions for writ of certiorari.

I. THE DECISION BELOW DIRECTLY CONTRADICTS DECISIONS OF THE SECOND AND THIRD CIRCUITS PRESERVING THE PRESUMPTION OF FINALITY OF COURT-ORDERED DISMISSALS

The rule adopted by the Fourth Circuit in the decision below flatly contradicts the established precedents in the Second and Third Circuits. In the Fourth Circuit, a district judge who, without any objection from the parties, has signed an unqualified order finally dismissing an action with prejudice -- thereby presumably bringing the litigation to an end -- may later be confronted with a reopening of the entire matter by virtue of an unforeseen Rule 11 motion. Every closed case, whether "permanently" concluded by litigation or by settlement, harbors the specter of an eventual Rule 11 motion. In the Second and Third Circuits, district judges do not face such prospects. Barr Laboratories, Inc. v. Abbott Laboratories, 867 F.2d 743 (2d Cir. 1989); Mary Ann Pensiero, Inc. v. Lingle, 847

F.2d 90, 100 (3d Cir. 1988).

Recognizing in part the inconsistency it was creating, the Fourth Circuit made an express effort to distinguish the facts of Barr. The court was apparently unaware of Lingle, however. It proclaimed: "No court has adopted a rule prohibiting a motion for Rule 11 sanctions after a dismissal with prejudice under Rule 41(a)(2)." 914 F.2d at 512.

In fact, the Third Circuit had done just that: "[W]e adopt as a supervisory rule for the courts in the Third Circuit a requirement that all motions requesting Rule 11 sanctions be filed in the district court before the entry of a final judgment." Lingle, 847 F.2d at 100. Emphasizing the "interest of judicial economy," the Third Circuit noted two significant practical problems with entertaining unforeseen Rule 11 motions in closed cases:

> In the district court, resolution of the issue before the inevitable delay of the appellate

> process will be more efficient because of current familiarity with the matter. Similarly, concurrent consideration of challenges to the merits and the imposition of sanctions avoids the invariable demand on two separate appellate panels to acquaint themselves with the underlying facts and the parties' respective legal positions.

847 F.2d at 99. Citing the Advisory Committee Note urging prompt notification of an intent to seek sanctions, the court further enjoined litigators in its courts to file motions well before cases were formally disposed of -- "as soon as practicable after discovery of the Rule 11 violation." 847 F.2d at 99-100, citing Schwarzer, Sanctions Under the New Federal Rule 11: A Closer Look, 104 F.R.D. 181, 194-95 (1985).

Courts within the Third Circuit have followed Lingle in rejecting belated Rule 11 motions in closed cases. Muller v. Temura Shipping Co., Ltd., 15 Fed. R. Serv. 3d 19 (E.D. Pa. 1989) (motion filed after a settlement); Roe v. Operation Rescue, No. 88-5157, 1989 West Law 66452

(E.D. Pa. June 19, 1989) (motion filed after dismissal).

The Fourth Circuit's analysis of Barr is of little more assistance than its ignorance of Lingle. The sole distinction the court could identify was that defense counsel in Barr also signed the dismissal papers:

> The present case is different from Barr because it does not involve a stipulated dismissal, which requires opposing counsel to sign the dismissal order.

914 F.2d at 512. In its zeal to emphasize the absence of a defense lawyer's "John Hancock," however, the Fourth Circuit averted its eyes from a signature of far greater significance. Both in Barr and the decision below, a federal district court judge signed the orders of dismissal.

Other than the fact that the defense lawyer in this case considered it inconvenient to add her signature below that of a federal judge -- although she "did not object" to his order -- there is little difference between Barr and this case. Both involved Rule 11 motions filed by defendants

weeks after a district court had ordered the actions dismissed with prejudice. Compare 867 F.2d at 748 with 914 F.2d at 513. And in both, the defendants had neither objected to the dismissal nor given any "indication that Rule 11 sanctions would be sought." 867 F.2d at 748; compare 914 F.2d at 512.

Based on these facts, the Second Circuit held that "[i]t is plain that Abbott's conduct lulled Barr into a false sense of security and that Barr was under the impression that the action was finally and conclusively terminated for all purposes." 867 F.2d at 748. That court thus affirmed Judge Duffy's decision that he had "no jurisdiction" to impose Rule 11 sanctions. Upon virtually the same facts, the Fourth Circuit held just the opposite.

In a final effort to distinguish Barr, the Fourth Circuit invoked this Court's recent decision in Cooter & Gell v. Hartmarx, 110 S.Ct. 247 (1990). In Cooter &

Gell, this Court held that a plaintiff's unilateral voluntary dismissal without prejudice in the face of a pending Rule 11 motion does not divest a district court of jurisdiction to resolve the pending motion. Thus, Cooter & Gell, unlike the situation addressed by Barr, Lingle, and this case,did not involve an unexpected Rule 11 motion filed long after an unqualified court-ordered dismissal with prejudice. Cooter & Gell does not address the inter-circuit conflict that the Fourth Circuit has created.[4]

This Court should grant certiorari to resolve this conflict in the circuits. All such disparities regarding the application of the Federal Rules of Civil Procedure bear

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[4]The Fourth Circuit implied that its decision to "decline to extend Barr to dismissals under Rule 41(a)(2)" was a question of first impression. Id. Even had the court been correct, this in itself could constitute sufficient reason to extend certiorari. See American Federation of Musicians v. Wittstein, 379 U.S. 171, 175 (1964) ("The question being an important one of first impression under the LMRDA, we granted certiorari.").

consideration. But when the effect of the conflict is to create jurisdiction in one circuit, resurrect long dead actions, and potentially deluge district courts and former litigants with sanctions motions in cases closed by court order, the matter merits careful scrutiny.

II. THE AMOUNT OF DUE PROCESS AFFORDED UNDER RULE 11 SHOULD NOT VARY FROM COURT TO COURT.

This Court has held that due process requires that one receive, prior to being sanctioned under 28 U.S.C. § 1927, "fair notice and an opportunity for a hearing on the record." Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980). Lower courts have applied this rationale in the Rule 11 context. The courts have failed to reach any accord, however, as to whether an evidentiary hearing is ever required under any circumstances and whether attorneys are entitled to be heard at all on the nature and extent of Rule 11 sanctions.

A. Due Process for Lawyers Now Varies by Circuit.

The Fourth Circuit held that "[d]ue process does not require an evidentiary hearing before sanctions are imposed, even when sanctions are imposed in part under the improper purpose prong of Rule 11." 914 F.2d at 521. The court made no exceptions to its blanket rule, even for disputed issues of fact or determinations of credibility.

The guidance provided by the Fourth Circuit to a district court regarding when it might, in its discretion, prefer to hold an evidentiary hearing is minimal:

> When there are issues of credibility, disputed questions of fact, and rational explanations of purpose given, an evidentiary hearing may well be necessary to resolve the issues. This is particularly true when large sanctions are being considered on the ground of improper purpose as well as failure to comply with the first two prongs of Rule 11.

914 F.2d at 520.

All five of those factors were present in this case.

Yet, the court ruled that the district court did not err in refusing to hold an evidentiary hearing. Id. at 521-22. In short, if not this case, when?

Moreover, tying the need for an evidentiary hearing to the size of the sanction puts the cart before the horse. A court does not know whether an evidentiary hearing is necessary until it has already decided, without an evidentiary hearing, to impose "large sanctions."

Fourth Circuit district courts are left with no clue -- and attorneys have no assurances -- as to when an evidentiary hearing must be held.

The other Courts of Appeals have likewise struggled with the question of when a district court must hold an evidentiary hearing before imposing Rule 11 sanctions. The majority appear to have concluded contrary to the Fourth Circuit that an evidentiary hearing on sanctions is essential when there are issues of fact, credibility

determinations, or questions of improper purpose. See, e.g., Jones v. Pittsburgh National Corp., 899 F.2d 1350, 1359 (3d Cir. 1990) (rule "mandates an evidentiary hearing to resolve disputes of material fact when the cold record may not disclose the full story, as here."); Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600, 607 (1st Cir. 1988) ("controverted factual matter . . . might have called for additional procedure"); Rodgers v. Lincoln Towing Service, Inc., 771 F.2d 194, 206 (7th Cir. 1985) ("sanctions on bad faith . . . would require a hearing").

In Donaldson v. Clark, 819 F.2d 1551, 1561 (11th Cir. 1987) (en banc), the court concluded that the factors set forth in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), mandated a hearing in such situations: "[W]hen a court is asked to resolve an issue of credibility or to determine whether a good faith argument can be made for the legal position taken, the risk of an erroneous imposition

of sanctions under limited procedures and the probable value of additional hearing are likely to be greater."[5]

Other courts, however, have reached a contrary conclusion, requiring no evidentiary hearing. See McLaughlin v. Bradlee, 803 F.2d 1197, 1205 (D.C. Cir.

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[5]See also Braley v. Campbell, 832 F.2d 1504, 1515 (10th Cir. 1987) (en banc) (with regard to Fed. R. App. Proc. 38, if fact issues arise affecting either the amount or whether sanctions should be imposed at all, there must be proceedings beyond oral argument to resolve these issues); Tom Growney Equip. v. Shelby Irrigation Development, 834 F.2d 833, 836 n.6 (9th Cir. 1987) ("in light of the due process violations, we decline to speculate what evidence might have been adduced if there had been proper notice and a meaningful evidentiary hearing"); INVST Financial Group v. Chem-Nuclear Systems, 815 F.2d 391, 405 (6th Cir.), cert. denied, 484 U.S. 927 (1987) ("at the hearing, Garratt's counsel fully cross-examined plaintiff's attorneys about the hours spent and fees charged. Therefore, Garratt was afforded notice and opportunity for a hearing, as required by due process"); Jenson v. Federal Land Bank of Omaha, 882 F.2d 340, 342 (8th Cir. 1989) ("Because we remand the case to give Jenson proper notice, he, of course, must be given a hearing on the issue"); Jones v. Continental Corp., 789 F.2d 1225, 1232 (6th Cir. 1986) ("We therefore agree with Jones's counsel that a hearing to resolve this factual issue must precede any award of attorney's fees" under 28 U.S.C. § 1927).

1986) ("Nor is [plaintiff] entitled to a hearing on whether sanctions should be imposed or what level of sanctions should apply").

If petitioners had been fortunate enough to be in the First, Third, Seventh, or Eleventh Circuits, they could, for example, have cross-examined Mr. Rose. Or they could have called Mr. Rosenthal to testify as to his vastly different recollection of the events described by Mr. Rose. Presumably Mr. Rosenthal's live testimony would have been more difficult to ignore than his affidavit. Either witness could have potentially eliminated the sole basis for the district court's most significant finding of improper purpose.

At stake is not only petitioners' financial stability, but their very livelihood and reputation. An attorney's stock in trade is his or her "name," reputation, and integrity. An attorney's ability to defend that integrity,

which may determine his or her ability to practice law, should not depend on the identity of the court in which he or she appears. Cf. Murray v. Giarratano, 492 U.S. 1, 109 S.Ct. 2765, 2771 (1989) (condemning result by which "a different constitutional standard would apply in different States"). Given the ubiquitous nature of Rule 11, guidance from this Court is necessary to establish uniform procedures.

B. The Decisions Below Do Not Comport with this Court's Due Process Decisions and Traditional Notions of Due Process.

Had this been an ordinary summary judgment order awarding $92,000 in compensatory damages and $30,000 in punitive damages -- in which the court, considering only affidavits, had decided disputed issues of fact, resolved conflicting inferences in favor of the non-moving party, and determined credibility and motive -- it would be reversed in short fashion. Rule 11 sanctions, with their

attendant implications for attorneys' careers, are no less deserving of protection from improper summary procedure.

This Court stressed in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), that it was not "authoriz[ing] trial on affidavits". The Court held that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions; not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." This Court emphasized again in Lujan v. National Wildlife Federation, 110 S.Ct. 3177, 3188 (1990), "Where the facts specifically averred by [the non-moving] party contradict facts specifically averred by the movant, the motion [for summary judgment] must be denied." That is, however, precisely the opposite of what the district court did here -- while punishing the attorneys in the amount of $122,000 and precluding them from practicing

before it.

This Court has also warned courts against drawing inferences of improper motive, in the face of plausible explanations, from purportedly objective evidence. In Matsushita Electric Industrial Co. v. Zenith Radio, 475 U.S. 574, 588 (1986), the Court held "that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Likewise, in Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 744-45 (1983), this Court barred the NLRB from concluding, prior to a trial, that a lawsuit is "improperly motivated," if there is a "genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts." Indeed, in the analogous situation of awarding attorneys' fees under EAJA, the Court has condemned drawing the inference of a "lack of substantial

justification" -- comparable to the Rule 11 standard -- from "objective indicia" when other innocuous explanations are available. Pierce v. Underwood, 487 U.S. 552, 568 (1988). The plaintiffs contended that the government's willingness to settle on unfavorable terms demonstrated its lack of substantial justification, an analysis identical to the district court's view in this case of petitioners' voluntary dismissal. This Court squarely rejected the plaintiffs' argument:

> Other factors, however, might explain the settlement equally well -- for example, a change in substantive policy instituted by a new administration. The unfavorable terms of a settlement agreement, without inquiry into the reasons for settlement, cannot conclusively establish the weakness of the Government's position. To hold otherwise would not only distort the truth but penalize and thereby discourage useful settlements.

Id. Similarly, petitioners offered a reasonable explanation for the dismissal: cessation of the unconstitutional activity. The district court's contrary inference, like the inference in

Pierce, will "penalize and thereby discourage useful" dismissals. There is no reason to treat the punishment of attorneys any differently from attorneys' fee petitions under EAJA.

The Fourth Circuit's dismissal of these due process concerns on the grounds that "the district court's determination that [petitioners'] explanations are not reasonable or believable . . . is not clearly erroneous," 914 F.2d at 520, provides no answer. It is in fact a "strange jurisprudence." Murray v. Giarratano, 492 U.S. 1, 109 S.Ct. 2765, 2771 (1989). Whether an individual is entitled to a particular procedural protection cannot be determined based on whether a decision is deemed correct based on a record created without that protection. The Fourth Circuit's analysis turns constitutional jurisprudence on its head.

C. The Failure of a Court to Allow a Party to Address the Nature and Extent of Sanctions Violates Due Process.

The district court provided plaintiffs' counsel no opportunity whatsoever to address the nature and extent of the sanctions. The court simply asked for defense counsel's fee records and, the day after receiving them, imposed these fees in their entirety as a sanction. Through this expedited process, the district court failed to afford plaintiffs even the most basic protections of due process.

The Fourth Circuit reversed the amount of sanctions, holding that

> [w]here a court determines that a large monetary sanction should issue, and the amount is heavily influenced by an injured party's fee statements, as was the case here, the court should permit the sanctioned party to examine and contest the injured party's fee statements as an aid to the court's own independent analysis of the reasonableness of the claimed fees.

914 F.2d at 524. Nevertheless, the court held that the

opportunity to respond is not generally required: A district court "may permit a sanctioned party to respond to an opposing party's fee statements in its discretion." Id.

Under the Fourth Circuit's decision, a party being sanctioned has no right to be heard on the nature and amount of the sanction. The attorney will not necessarily be allowed to file a brief discussing the factors relevant to the nature and amount of the sanction; to file any response to a fee affidavit; or to present oral argument. In short, when it comes time to set the sanction, the Fourth Circuit holds that the attorney is entitled to no process.

The case of White v. General Motors Corp., Inc., 908 F.2d 675, 686 (10th Cir. 1990), conflicts with the Fourth Circuit's holding -- even though the Fourth Circuit expressly adopted other portions of the White court's decision. In White, the court acknowledged that due process rights, including the right to be heard, attach to the

question of the reasonableness of the sanction. 908 F.2d at 686. The court imposed a due process floor: "The opportunity to fully brief the issue is sufficient to satisfy due process requirements." Id. The Fourth Circuit's rejection of this right to brief the issue is inconsistent with the Tenth Circuit rule. See also Davis v. Veslan Enterprises, 765 F.2d 494, 500 n.12 (5th Cir. 1985) (due process afforded in Rule 11 case when counsel given nearly two months time to respond to the fee affidavits); Pesaplastic, C.A. v. Cincinnati Milacron Co., 799 F.2d 1510 (11th Cir. 1986) (in Rule 37 sanctions case, due process afforded when sanctioned party has an opportunity to challenge the fee affidavits).

Courts awarding attorneys' fees in other contexts never make decisions from one-sided presentations. At a minimum, they require "substantial briefs from both sides." Copeland v. Marshall, 641 F.2d 880, 905 (D.C. Cir. 1980)

(en banc). Usually the party opposing the petition is permitted the opportunity to pursue discovery. National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1329 (D.C. Cir. 1982) (per curiam) (information obtained in discovery "is essential in the calculation of the fee award and opposing counsel should have access to the information as a matter of right."); McManama v. Lukhard, 616 F.2d 727, 729 (4th Cir. 1980) (fees awarded only "[a]fter permitting discovery, briefing and argument on the issue"). Some courts have required evidentiary hearings to determine the reliability and reasonableness of fees and expenses. See, e.g., Wulf v. City of Wichita, 883 F.2d 842, 876 (10th Cir. 1989) (requiring evidentiary hearing to determine appropriate amount of attorneys' fees); National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1330 (D.C. Cir. 1982) (per

curiam) ("[P]rocedural fairness requires that a hearing be held where in the District Court's view material issues of fact that may substantially affect the size of the award remain in well-founded dispute."); Henson v. Columbus Bank and Trust Co., 651 F.2d 320, 330 (5th Cir. 1981) (presence of factual disputes as to the amount of time and duplicative effort requires evidentiary hearing).

There is little distinction between the collateral issue of attorneys' fees and the nature and amount of a Rule 11 sanction. The Fourth Circuit, however, reasoned:

> Because the purposes of sanctions differ from those of attorney's fees, the amount of process due the offending party differs.
>
> The determination of the type or amount of the sanction imposed comes only after the offending party has had an opportunity to defend against the imposition of any sanction. Presumably, a party's interest in the kind and amount of a sanction is of less import than his or her interest in the decision to impose any sanction.

914 F.2d at 523. This is a distinction without a difference.

In attorneys' fees cases, such as Title VII or 42 U.S.C. § 1988, fees are awarded only after the plaintiff has prevailed on the merits. To paraphrase the Fourth Circuit's ruling, the defendant's interest in the amount of the attorney's fee to be awarded is presumably of less import than his interest in the decision that the plaintiff has prevailed on the merits. Nevertheless, defendants are routinely allowed discovery, briefing, and oral argument, and occasionally an evidentiary hearing.[6]

Moreover, it is hardly fair to conclude that an attorney's interest in the nature and amount of the sanction is of such insignificant importance as to require no process. By virtue of this Court's holding in Pavelic & LaFlore v. Marvel Entertainment Group, 493 U.S. ____, 107 L.Ed.2d

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[6]Ironically, had petitioners' clients prevailed, defendants undoubtedly would have taken advantage of all of these procedures. Petitioners, however, are not entitled as a matter of course to comparable protections.

438 (1989), and the improbability of coverage by malpractice insurance, the amount of any monetary sanction will likely come out of the attorney's own pocket. And a law professor's pocket is hardly as deep as a typical Title VII or § 1983 defendant's. More significantly, if the court imposes the sanction of converting a dismissal without prejudice to one with prejudice, the attorney has an overwhelming interest in protecting his clients. See Anders v. Versant Corp., 788 F.2d 1033, 1037 (4th Cir. 1986) (in connection with a dismissal under Rule 41(a)(2), "plaintiff deserved an opportunity to respond to defendants' request for dismissal with prejudice.").

Indeed, contrary to the Fourth Circuit's assumption, 914 F.2d at 523, the purpose of sanctions -- to punish and deter litigation abuse -- requires more due process, not less. Only this month, this Court discussed at length the due process implications of punitive damages, which also

have traditionally been used for deterrence and punishment. Pacific Mutual Life Insurance Co. v. Cleopatra Haslip, 59 U.S.L.W. 4157, 4161-63 (U.S. March 5, 1991). The Court noted, "One must concede that unlimited jury discretion -- or unlimited judicial discretion for that matter -- in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." Id. at 4161.

Here, the lack of guidance has led to just such an extreme result. The lack of procedural protections in the Fourth Circuit gives attorneys good reason to fear further such results, especially when their case involves unpopular views or clients. See Id. at 4171 (O'Conner, J., dissenting) (noting need for additional procedural protections with regard to punitive damages).

Bright-line procedural protections -- such as simply the opportunity to respond in writing -- would go far in

ensuring greater uniformity and fairness in decisions and ease in appellate review. This case presents this Court with the opportunity to provide such guidance to lower courts.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petitions should be granted.

Respectfully submitted,

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